IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MICHAEL D. WHARTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 04C-02-035 WCC
	)	
WORLDWIDE DEDICATED SERVICES, d/b/a UPS LOGISTICS GROUP, and CHOICEPOINT INC.,	)	
	)	
Defendants.	)	

Submitted: October 19, 2006
Decided: February 2, 2007

MEMORANDUM OPINION

Upon Plaintiff Michael D. Wharton's Motion for Partial Summary Judgment. DENIED.

Upon Defendant Choicepoint Inc.'s Motion for Summary Judgment. GRANTED.

Upon Defendant Worldwide Dedicated Services's Motion for Summary Judgment. GRANTED.

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CARPENTER, J.

Introduction

Currently before this Court is a series of cross motions for summary judgment with respect to the claims asserted by the Plaintiff. Upon review of the record and briefs submitted by the parties, the Court issues the following opinion.

Facts

Michael D. Wharton became employed by Worldwide Dedicated Services d/b/a UPS Logistics Group ("Worldwide") in early January 2002 as a tractor trailer driver. On January 29, 2002, Mr. Wharton was involved in a work-related accident whereupon the tractor trailer he was operating turned over onto the driver's side, resulting in a one-vehicle accident. Mr. Wharton was transported from the accident scene to a local hospital for treatment. The following day, Mr. Wharton submitted a urine specimen which was analyzed by Laboratory Corporation of America Holdings ("LabCorp"). Upon completion of the analysis, LabCorp determined Mr. Wharton's specimen contained the opiates codeine and morphine. This finding was reported to ChoicePoint for verification.[1] Upon completion of the verification process, on February 7, 2002, ChoicePoint contacted Worldwide and advised them

[1]ChoicePoint was retained by Worldwide to provide the Medical Review Officers (MRO) to both review the testing procedure used by LabCorp, and to determine if a legitimate medical explanation for a positive test result could be provided. This quality control step occurs prior to releasing the test results to an employer.

of the positive result. Mr. Wharton's employment with Worldwide was thereafter terminated on the first day that he was able to return to work after the accident.

As a result, on February 4, 2004, Mr. Wharton filed a complaint against both ChoicePoint and Worldwide, which was amended on December 12, 2005. The amended complaint asserts that ChoicePoint was negligent in obtaining the verification of Mr. Wharton's results, and that ChoicePoint defamed Mr. Wharton by releasing incorrect results to his employer, Worldwide. Mr. Wharton asserts Worldwide wrongfully terminated his employment and breached an implied covenant of good faith and fair dealing. Both defendants dispute the allegations. Each party has filed a summary judgment motion, and the three summary judgment motions are currently before this Court.

Standard of Review

Summary judgment is a tool used by the courts to remove factually unsupported claims.[2] Summary Judgment is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to

[2] *Durig v. Woodbridge Bd. of Educ.*, 1992 WL 301983 (Del. Super. Ct.), at * 7 (Summary judgment is appropriate when "the nonmoving party bears the ultimate burden of proof and the moving party can illustrate a complete failure of proof regarding an essential element of the nonmovant's case.") (citations omitted).

judgment as a matter of law.[3] In considering such a motion, the Court must evaluate the facts in the light most favorable to the non-moving party.[4] Summary judgment will not be granted when the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[5] In the instance of cross motions for summary judgment, the parties concede the lack of disputed material facts and acknowledge adequacy of the record to support their party's respective motion.[6] Unless the parties advise the court otherwise, cross motions will be considered a stipulation by the parties to allow the court to render a "decision on the merits based on the record submitted with the motions."[7]

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[3] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. Ct. 1996).

[4] *Pierce v. Int'l. Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[5] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-469 (Del. 1962).

[6] *Browning-Ferris, Inc. v. Rockford Enters.*, 642 A.2d 820, 823 (Del. Super. Ct. 1993).

[7] Super. Ct. Civ. R. 56(h) states:
Cross motions. Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for a decision on the merits based on the record submitted with the motions.

Discussion

I. MR. WHARTON V. CHOICEPOINT

A. *DEFAMATION CLAIM*

Mr. Wharton first asserts that ChoicePoint committed defamation by advising Worldwide of the positive test result relating to the specimen collected following the accident. A claim of defamation requires the following elements to be established: "1) a false and defamatory communication concerning the plaintiff, 2) publication of the communication to third parties, 3) understanding of the defamatory nature of the communication by the third party, 4) fault on the part of the publisher, and 5) injury to the plaintiff."[8] The record before the Court is devoid of any substantiated evidence that the results were in fact false, and thus a claim of defamation fails.

Unfortunately, at this juncture, it will be extremely difficult, if it is even possible, to verify with certainty that the specimen provided by Mr. Wharton falsely tested positive for codeine and morphine, but this does not negate the burden the Plaintiff holds to prove its falsity. In an attempt to establish the falsity of the positive test result, Mr. Wharton asserted within his first amended complaint that the hospital provided a prescription of Percocet to Mr. Wharton, and ingestion of Percocet would

[8] *Bickling v. Kent Gen. Hosp.*, 872 F.Supp. 1299, 1307 (D.Del. 1994).

cause a positive test result.[9] Mr. Wharton has since withdrawn this allegation,[10] and he offers no credible alternative theory or evidence showing the positive test result was an error. Because Mr. Wharton cannot establish the test results published by ChoicePoint were false, his claim of defamation fails and the Court need not delve into any remaining elements of the defamation claim.

B. ***NEGLIGENCE CLAIM***

Mr. Wharton next asserts ChoicePoint was negligent by failing to perform the duties required under the federal regulations. Specifically, the Plaintiff argues ChoicePoint breached its duty to: 1) review the information submitted by Mr. Wharton to indicate a legitimate medical reason for the positive result; 2) maintain a proper chain of custody of Mr. Wharton's specimen; 3) notify Worldwide that Mr. Wharton disputed his test results; and 4) advise Mr. Wharton of his right to request the split specimen be tested within 72 hours. ChoicePoint's duty to Mr. Wharton is created under Title 49,[11] and thus the claims by Mr. Wharton are that ChoicePoint was negligent *per se.*

To establish negligence *per se*, a plaintiff must set forth that: "a standard of

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[9]Am. Compl. ¶21.

[10]Pl. Answ. Brief, 1, n.1.

[11]49 C.F.R. §40.1, *et seq*. (Procedures for Transportation Workplace Drug and Alcohol Testing Programs).

conduct exists to protect the class of which plaintiff is a member; defendant is required to conform to that standard of conduct; and the defendant did not so conform."[12] However, even if a plaintiff establishes a violation of a federal regulation, the plaintiff must still establish that the violation proximately caused the plaintiff's injury.[13] Since the entire drug testing process is federally regulated, to determine if ChoicePoint acted negligent *per se* in testing Mr. Wharton's specimen, each step of the process in which ChoicePoint participated must be analyzed.

(i) Collection of the Specimen and Initial Handling

First, following an accident involving a commercial motor vehicle on a public road, an employer must test the driver for certain controlled substances. This test must be administered as soon as practicable, but within 32 hours of the incident, and the test must be administered pursuant to certain guidelines.[14] Once a sample is properly collected, the collector must follow the federally regulated process to ensure

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[12] *Hall v. Bioquest Lab., Inc.*, 1991 WL 138362 (Del. Super. Ct.), at *2 (citations omitted).

[13] *Price v. Blood Bank of Del., Inc.*, 790 A.2d 1203, 1213 (Del. 2002) ("Establishment of negligence *per se* through violation of a federal administrative regulation, standing alone, does not establish liability. There must be proof of proximate cause., i.e. that the violation of the regulation was a proximate cause of plaintiff's injury.") (citations omitted); see also *Hall*, 1991 WL 13862, at *2.

[14] 49 U.S.C. § 31306(b)(1)(A), 49 C.F.R. § 382.303(d)(2) ("If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. . . .")

the specimen is secured and shipped to the laboratory, including sending the specimen and appropriate Federal Drug Testing Custody and Control Form (CCF) to the laboratory.[15] The collector must also send a copy of the CCF to a Medical Review Officer (MRO) within 24 hours of collection.[16] Upon receiving a specimen, the laboratory, which in this case is LabCorp, is to test for five drugs: (1) marijuana metabolites; (2) cocaine metabolites; (3) amphetamines; (4) opiate metabolites and (5) phencyclidine.[17] There appears to be no dispute with respect to the procedure of testing up to this point. LabCorp properly obtained what was represented to be Mr. Wharton's specimen, conducted all necessary initial and confirmatory tests, completed all required forms and sent the specimen and forms to ChoicePoint, in accordance with the federal guidelines.[18]

(ii) Medical Review Officers

Once the laboratory confirms a positive test result, the specimen and appropriate forms are sent to a Medical Review Officer, and in the case at hand,

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[15]49 C.F.R. §40.73. (A CCF is used by MRO's to ensure each step was properly followed.)

[16]*Id.*

[17]49 C.F.R. § 40.85.

[18]Def. ChoicePoint Mot. Summ. J., Ex. B (Watson Depo.), 286. ("The confirmatory technique was GC/MS and the initial testing for opiates as well as other compounds was conducted utilizing immunoassay technique.")

ChoicePoint is the MRO. An MRO provides quality control to the drug-testing procedure and acts as an independent gatekeeper to ensure the accuracy and integrity of the drug testing process.[19] The MRO is first required to review all CCFs to determine that the proper procedures were followed by the preceding laboratory, or if the results should be canceled because procedures were not adhered to.[20] According to Dr. Hoffman, who was deposed as a representative of ChoicePoint, the quality control group did in fact review the CCF and accompanying sand sheet[21] and concluded all procedures were followed.[22] Further, Joseph Watson, MS, a Manager of Forensic Toxicology for LabCorp, reviewed the forms thoroughly, indicating each step taken by LabCorp to ensure procedures were appropriately followed.[23]

(a) Chain of Custody

While it appears the Plaintiff has not questioned the procedures ChoicePoint followed up to this point, and the record does not reflect anything contrary to proper procedure, Plaintiff now appears to be specifically questioning whether ChoicePoint

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[19]49 C.F.R. § 40.123.

[20]*Id.*

[21]It appears the "sand sheet", referenced a number of times throughout various depositions, is the form where ChoicePoint documents each time ChoicePoint and Mr. Wharton make contact, and with any documents received for verification purposes.

[22]Def. Worldwide Mot. Summ. J., App. Ex. E (Hoffman Depo.), 30-31.

[23]Def. ChoicePoint Mot. Summ. J., Ex. B 292-303, Ex. D.

or LabCorp negligently tested the wrong specimen for Mr. Wharton.[24] Unfortunately for the Plaintiff, the record is void of any evidence to question the chain of custody procedure.[25] During Dr. Hoffman's deposition he indicated there was no breach of the integrity of the chain of custody of Mr. Wharton's specimen within LabCorp or ChoicePoint.[26] Further, ChoicePoint was only able to verify the test results of Mr. Wharton because the specimen identification number and social security number matched, again indicating the proper specimen was tested.[27] Thus, there is no basis or reason for ChoicePoint to conclude the specimen tested was not Mr. Wharton's. The Plaintiff has not offered any documentation to negate ChoicePoint's findings, nor to show the chain of custody may have been tainted.

Finally, Mr. Wharton has not provided, nor can the Court find, any regulation or standard procedure requiring ChoicePoint to analyze Mr. Wharton's specimen again once it received documentation stating he took Percocet at the hospital, to determine if Percocet was present in the sample as a means to verify the specimen

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[24]The Court notes this specific argument was not in the Amended Complaint, however, it was alluded to in the Plaintiff's Summary Judgment Motion, and the Court will address it.

[25]49 C.F.R. § 40.123.

[26]Def. Worldwide Mot. Summ. J., App. Ex. E (Hoffman Depo.), 253; Pl. Mot. Summ. J., App. 320-328.

[27]*Id.*

tested was that of Mr. Wharton.[28] In fact, federal regulations specifically indicate ChoicePoint may only test for the five above-enumerated drugs.[29] Nevertheless, with no breach of the chain of custody, ChoicePoint would have no reason to do this additional test, even if federal regulations allowed. Because there is no documentation or testimony showing there was a flaw in the chain of custody, and because there is no mandated requirement to test for the drugs prescribed to Mr. Wharton to verify the sample, this argument path leads to a dead-end.

(b) Verification

Upon reviewing the appropriate forms, next an MRO must verify the positive result by determining if there is a "legitimate explanation for confirmed positive, adulterated, substituted, and invalid drug results from the laboratory."[30] To verify the result, the MRO is required to conduct a medical interview directly with the employee, review the employee's medical history and "take all reasonable and necessary steps to verify the authenticity of all medical records the employee

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[28]Counsel argued to the Court that oxycodone should have appeared on the GC/MS test, and because it did not, the sample tested could not have been Mr. Wharton's. This argument was first made orally to the Court, and the Court will address it here.

[29]Def. Worldwide Mot. Summ. J., App. Ex. E (Hoffman Depo.), 253-254 (Dr. Hoffman testified that ChoicePoint did not test for oxycodone in Mr. Wharton's sample because it is prohibited by the Department of Transportation.)

[30]49 C.F.R. §40.123(c).

provides" if the employee indicates he is taking a prescription medication that resulted in the positive result.[31]

Dr. Freeman of ChoicePoint did conduct an initial medical interview upon receipt of a confirmed positive result of Mr. Wharton's specimen on February 5, 2002.[32] In fact, Mr. Wharton had contact with ChoicePoint on a number of occasions from February 5, 2002 through March 26, 2002 regarding his test results.[33] Throughout this time, Mr. Wharton attempted to provide a legitimate medical reason for the positive test result by providing hospital records which indicated that the hospital gave Mr. Wharton Percocet for his pain the day before the test was administered. Upon review of the records provided by Mr. Wharton, ChoicePoint determined there was no reasonable basis to explain the positive test result, despite the records indicating Mr. Wharton ingested Percocet.[34]

Pursuant to the federal regulations, if upon completion of the interview process, there is no legitimate reason otherwise, the test is deemed a verified positive result.[35]

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[31]49 C.F.R. § 40.141.

[32]Pl. Mot. Summ. J., App. 332.

[33]*Id.* at 333-334.

[34]*Id.* at 332.

[35]According to 49 C.F.R. § 40.139, an MRO "must verify the test results positive unless the employee presents a legitimate medical explanation for the presence of the drug or drug metabolite in his or her system."

Also pursuant to the federal regulations, as soon as practicable, but no later than 24 hours after a test result is verified, the verified results must be provided to the employer by the MRO.[36] Since ChoicePoint determined there was no legitimate reason for the positive results, despite the hospital reports, Mr. Wharton's results became verified after the initial interview. Thus, pursuant to ChoicePoint's statutory duty,[37] ChoicePoint verified the positive test result on February 6, 2002, and released the verified positive result to Worldwide on February 7, 2002, within 24 hours of verification pursuant to federal regulation requirements. Because there is no evidence to contradict the MRO's decision, and no legitimate medical reason exists for the positive result, and since the Plaintiff has withdrawn his theory that ChoicePoint negligently ignored that Percocet caused the positive result, Mr. Wharton cannot establish negligence up to this point.

(iii) Split Specimen Test

The MRO is also required to advise the employee of his right to request within 72 hours that his split specimen, which was initially collected from the donor, be sent

[36]49 C.F.R. §40.167(b) ("As the MRO who transmits drug test results to the employer, you must comply with the following requirements: (b)You must transmit to the DER on the same day the MRO verifies the result or the next business day all verified positive test results. . . .")

[37]49 C.F.R. § 40.13(e), 40.23(a).

to another site for testing.[38] Mr. Wharton asserts he was not advised of his right to have a split specimen test, and if he was so advised, ChoicePoint did not wait 72 hours to allow Mr. Wharton to make his request before reporting the positive test results to Worldwide. Neither argument is supported by facts presented to this Court.

First, according to a letter from Mary Ann Peltier of ChoicePoint, which enumerated each contact of ChoicePoint with Mr. Wharton, Mr. Wharton was advised of his split specimen rights on February 6, 2002.[39] This letter was created based on the original sand sheet, CCF and computer-generated screens that were completed after each step of the process.[40] In addition, Dr. Hoffman testified at his deposition, based on an entry on the sand sheet, that Mr. Wharton was advised of his right to have a split specimen test during a phone call on February 6, 2002.[41] If the Court only had before it the testimony of Dr. Hoffman and the letter from Ms. Peltier,

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[38]49 C.F.R. §40.153; 49 C.F.R. § 40.171 indicates "an employee, when the MRO has notified you that you have a *verified* positive drug test ... you have 72 hours from the time of notification to request a test of the split specimen." At the time of the collection, the urine sample is separated into two samples. Sample A is initially tested and verified, and Sample B may be tested upon a positive result and if the donor so requests.

[39]Pl. Mot. Summ. J., App. 332. The Court notes that this entry within the letter indicates "Mr. Martin" was the donor who was advised of his right to a split test, not Mr. Wharton. However, based on the fact that 1) when speaking to a donor, ChoicePoint requires a donor to verify his social security number, not his name; 2) Dr. Hoffman stated in his deposition it appeared to simply be a scrivener error and ChoicePoint computer systems would not allow a name search to determine if a Mr. Martin did exist; and 3) the additional evidence that points to the fact Mr. Wharton was aware of his rights, as discussed within this opinion, the Court will not alter its decision based on this fact alone.

[40]Def. Worldwide Mot. Summ. J., App. Ex. E (Hoffman Depo.), 133.

[41]*Id.* at 162.

coupled with Mr. Wharton's contrary testimony that he was not notified, there would be a question of material fact regarding whether the Plaintiff was on notice.

However, Mr. Wharton also received the Drug and Alcohol Testing Handbook from Worldwide on December 20, 2001.[42] With respect to urine drug test procedures, the handbook indicates the following:

> 6. In the event of a positive drug test result, the donor has 72 hours to request that the MRO forward the split sample to another DHHS certified laboratory to have an additional GC/MS confirmation test performed.[43]

Thus, Mr. Wharton was put on notice of his right to a split specimen test when he signed the verification indicating he received the handbook. While this may not alleviate any negligence on the part of ChoicePoint if it did not properly notify Mr. Wharton of his rights pursuant to the federal regulations, it certainly indicates Mr. Wharton should have been aware of his right to have the split specimen tested, and he chose not to exercise that right. Mr. Wharton's failure to follow the procedure to which he had notice constitutes a waiver, which now acts as a bar to his complaint in this area.

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[42]Pl. Mot. Summ. J., App. 351 (signed certification of receipt of handbook by Mr. Wharton); Pl. Answ. Br. to Def. ChoicePoint., Ex. A (Wharton Depo.), 59; Pl. Answ. Br. to Def. Worldwide, 6 ("...Wharton was entitled to rely upon the provisions of the Handbook...for ensuring the test was conducted properly.").

[43]Pl. Mot. Summ. J. App. 346.

Lastly, Mr. Wharton asserts that he was advised of his right to seek a split specimen test after his results were released to his employer, and for this ChoicePoint was negligent. Dr. Hoffman indicated in his deposition with respect to verifying a positive test result, that despite ChoicePoint stating it would delay verification to allow the donor to provide a legitimate medical explanation, ChoicePoint could release the verified test results to an employer:

> When we say hold for 24 hours, that doesn't mean that you cannot release it before the 24 hours. In other words, if you get the information for which you were holding in, say, 10 hours or 12 hours and it doesn't help you, then you send it out. In other words, you don't —when we say hold for 24 hours for additional information, if the additional information comes in before that 24 hours is up, then you can make your decision before that.[44]

Here, the information provided by Mr. Wharton was not sufficient for ChoicePoint to alter the positive result, and therefore released the results to Worldwide.

In addition, the federal regulations demand the results to be reported within 24 hours of verification to the employer, and demand an employer to immediately act upon those verified positive results by not allowing the employer to take part in any safety-sensitive functions.[45] These regulations indicate the need to remove any

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[44]Pl. Mot. Summ. J., App. 88.

[45]49 C.F.R. § 40.23(a) indicates "As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen

person who tested positive for a drug from a safety-sensitive position upon the first test, and not wait for the split specimen to be tested. Thus, ChoicePoint was not obligated to wait 72 hours to see if Mr. Wharton wanted to have the other specimen tested before notifying Worldwide.

Since the record indicates ChoicePoint followed the federal regulations regarding Mr. Wharton's drug test, and is devoid of sufficient evidence to contradict this, there is not a genuine issue of material fact such that a reasonable jury could find for Mr. Wharton. Accordingly, ChoicePoint's motion for summary judgment with respect to negligence *per se* is granted, and Mr. Wharton's motion for summary judgment with respect to negligence *per se* is denied.

II. MR. WHARTON V. WORLDWIDE

Mr. Wharton alleges Worldwide wrongfully terminated his employment since Worldwide knew or should have known that the positive drug test reported by ChoicePoint was suspect. Admitting he was an at-will employee, Mr. Wharton's argument is based on his assertion that Worldwide breached the implied covenant of good faith and fair dealing (the "covenant") of the employment contract.

At-will employees may be terminated at any time without cause or justification, except in four instances: 1) termination violates public policy; 2) misrepresentation

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test."

by the employer; 3) employer used its position to deprive employee of compensation and 4) employer falsified records to create grounds for termination.[46] Courts have long recognized that an employer has wide latitude in terminating an at-will employee, and aside from these narrowly construed exceptions, the Court will not disturb an employer's decision.[47] Mr. Wharton does not contest that he was an at-will employee of Worldwide,[48] thus, in order to establish the claim that Worldwide breached the covenant when Worldwide terminated his employment, Mr. Wharton must establish one of the four aforementioned exceptions.

To do so, Mr. Wharton first argues that Worldwide violated the covenant by terminating him in a manner that violates public policy. The United States Supreme Court has recognized a "strong regulation-based public policy against drug use by workers who perform safety-sensitive functions."[49] The Court further recognized that "when promulgating these regulations, DOT decided not to require employers either to 'hold a job open for a driver' who has tested positive, on the basis that such

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[46]*E.I. DuPont de Nemours & Co. v. Pressmen*, 679 A.2d 436 (Del. 1995).

[47]*Pressmen*, 679 A.2d at 441 ("Nothing said here is to be construed as limiting an employer's freedom to terminate an at-will employment contract for its own legitimate business reasons, or even highly subjective, reasons. Such a contract is still terminable by either party for any reason not motivated by bad faith."), citing *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96 (Del. 1992).

[48]Pl. Answ. Br. to Def. Worldwide, 5.

[49]*E. Assoc'd Coal Corp. v. United Mine Workers of Am. Dist. 17*, 531 U.S. 57, 62 (2000).

decisions 'should be left to the management/driver negotiation.'"[50] Here, Worldwide was following the strong public policy recognized by the United States Supreme Court by ensuring a driver employed by the company was not operating a vehicle while under the influence of a drug. Thus, by promoting this public policy, Worldwide could not also violate public policy with the same action. As such, Mr. Wharton's argument that Worldwide acted contrary to public policy logically fails.

Secondly, Mr. Wharton asserts that, pursuant to the federal regulations, Worldwide remains responsible for any agency used to perform a drug test.[51] However, Mr. Wharton has misunderstood the federal regulations on its face. The regulations make Worldwide responsible to use an agency that has met the qualifications set forth within the regulations.[52] And, even if Worldwide relied in good faith that the agency was qualified, Worldwide can be sanctioned by a DOT

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[50] *Id.* (The courts should refrain from interference with labor-management agreements about the discipline of employees when possible.); see also, *Mann v. Cargill Poultry, Inc.*, 1990 WL 91102, at * 6 (DOT is not required to hold a job open for those who test positive.).

[51] 49 C.F.R. § 40.15(a) states, "As an employer, you may use a service agent to perform the tasks needed to comply with this part and DOT agency drug and alcohol testing regulations, consistent with the requirements of Subpart Q and other applicable provisions of this part."

[52] *Id.* ("As an employer, you are responsible for ensuring that the service agents you use met the qualifications set forth in this part (e.g. §40.121 for MROs). You may require service agents to show you documentation that they meet the requirements of this part (e.g., documentation of MRO qualifications required by §40.121(e)).")

agency for violating the regulations.[53] However, the regulations do not indicate Worldwide will be held responsible if a qualified MRO was negligent.

More importantly, as indicated previously in this opinion, the Court has determined that Mr. Wharton did not establish that ChoicePoint acted negligently in performing its duty to analyze Mr. Wharton's specimen and report the findings to Worldwide. And, since Worldwide is forbidden by the federal regulations to disregard the verified positive result from an MRO,[54] Mr. Wharton's second assertion fails.

Lastly, Mr. Wharton asserts Worldwide violated the covenant of fair dealing by accepting the verified positive result from ChoicePoint without allowing Mr. Wharton the opportunity to dispute the results by providing a legitimate reason for the positive result within five days, or by allowing 72 hours to request a split specimen test as the Drug & Alcohol Testing Handbook requires. These claims are without merit. The federal regulations mandate action be taken immediately by both ChoicePoint and Worldwide, and if a legitimate explanation is thereafter provided, the verified positive

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[53]49 C.F.R. § 40.15(c) states:

> You remain responsible for compliance with all applicable requirements of this part and other DOT drug and alcohol testing regulations, even when you use a service agent. If you violate this part or other DOT drug and alcohol testing regulations, even when you use a service agent. If you violate this part or other DOT drug and alcohol testing regulations because a services agent has not provided services as our rules require, a DOT agency can subject you to sanctions. . . .

[54]49 C.F.R. § 40.23(a) (Once an employer receives the initial report from the MRO of a verified positive drug test, the employee must immediately be removed from any safety-related functions without waiting for a split specimen test to be performed.).

result will be altered.[55] While Mr. Wharton asserts he was not given the appropriate amount of time by Worldwide, the fact is, Mr. Wharton was not terminated by Worldwide for approximately three months from the date of the accident and release of the verified positive drug test. While the Court is not convinced Worldwide is required to provide any extra time under the federal regulations, the facts before the Court indicate Mr. Wharton had an abundance of time prior to his termination to provide any legitimate reason for the positive drug test, and the record is still devoid of a legitimate reason four years later. As such, Mr. Wharton's claim for wrongful termination fails.

Conclusion

For the foregoing reasons, Worldwide's Motion for Summary Judgment is hereby GRANTED; ChoicePoint's Motion for Summary Judgment is hereby GRANTED; and Mr. Wharton's Motion for Summary Judgment is hereby DENIED.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.

[55] 49 C.F.R. § 40.149.